

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL

76-7042

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P/S

To be argued by
CHARLES A. LATORELLA, JR.

United States Court of Appeals
FOR THE SECOND CIRCUIT

TAXI WEEKLY, INC.,
Plaintiff-Appellee,
against

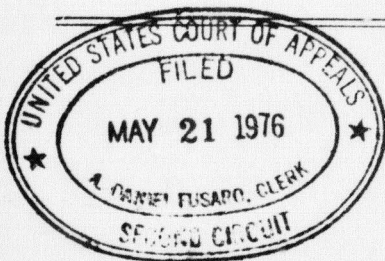
METROPOLITAN TAXICAB BOARD OF TRADE, INC., HOSYND PUBLICATIONS, INC., JACK PLOTSKY, ESTATE OF MORRIS HEIT, ESTATE OF GEORGE MCINTYRE, ALFRED ZEFF, MORRIS LEFKOWITZ, MILTON MARKS, LEON MURSTEIN, GERALD NAREN, IRA SUCHMAN, LEONARD SCHAFTRAN, and BENJAMIN BOTWINICK,

Defendants-Appellants,
and

TAXICAB BUREAU, INC., EMPIRE TAXICAB COOPERATIVE, INC., INDEPENDENT TAXICAB OWNERS GUILD, INC., UNITED TAXI OWNERS GUILD, INC., SALVATORE BARON, ESTATE OF ALFRED J. MARKS and ESTATE OF NATHAN LEVINE,

Defendants.

**REPLY BRIEF OF DEFENDANT-APPELLANT,
BOTWINICK**



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United States Court of Appeals
FOR THE SECOND CIRCUIT

TAXI WEEKLY, INC., *Plaintiff-Appellee,*
against

METROPOLITAN TAXICAB BOARD OF TRADE, INC., HOSYND PUBLICATIONS, INC., JACK PLOTSKY, ESTATE OF MORRIS HEIT, ESTATE OF GEORGE MCINTYRE, ALFRED ZEFF, MORRIS LEFKOWITZ, MILTON MARKS, LEON MURSTEIN, GERALD NAREN, IRA SUCHMAN, LEONARD SCHAFFRAN, and BENJAMIN BOTWINICK,

Defendants-Appellants,

and

TAXICAB BUREAU, INC., EMPIRE TAXICAB COOPERATIVE, INC., INDEPENDENT TAXICAB OWNERS GUILD, INC., UNITED TAXI OWNERS GUILD, INC., SALVATORE BARON, ESTATE OF ALFRED J. MARKS and ESTATE OF NATHAN LEVINE,

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**REPLY BRIEF OF DEFENDANT-APPELLANT,
BOTWINICK**

Defendant-appellant Botwinick respectfully joins in the reply brief submitted by the remaining defendants-appellants. This reply brief will be confined to matters concerning the evidence against Mr. Botwinick.

The Evidence Against Botwinick

The analysis of the evidence against Botwinick in appellee's brief (Br., pp. 6-10, 12, 49-51) utterly fails to point to any proof of Botwinick's complicity in the alleged conspiracy. Far from exhibiting a "smoking gun", appellee's analysis actually gives point to the weakness of its case.

Appellee relies primarily on Botwinick's "leadership position", his activities as a spokesman for the fleet owners, and the meeting of July 13, 1964 in his office (Appellee's Br., p. 49). As has been demonstrated in our main brief (pp. 4, 6-7, 9-10) none of these things sufficed to establish his membership in the alleged conspiracy. "Leadership position" alone, without proof of knowledge or participation, is clearly not sufficient to establish personal liability. Acting as a spokesman on public issues hardly implies conspiratorial activity. Finally, no connection whatsoever was established between the meeting of July 13, 1964 in Botwinick's office, and the subsequent cancellations; none of the persons at the meeting cancelled subscriptions.

Apparently recognizing the extreme weakness of its case against Botwinick, appellee grasps at the charge that Botwinick somehow had something to do with the dispute between Peterman and Weisinger (Appellee's Br., pp. 49-51). As the trial Court commented:

"I do not recall one ounce of evidence from which this jury could decide that Weisinger was put up to this, or urged to do this, or induced to do so, or whatever you want to say by any of the defendants here" (A960).

Nevertheless, appellee relies heavily on an alleged admission by a co-defendant, Murstein,* made two years after the event, and not mentioning Botwinick by name. Clearly, this alleged admission was not binding on Botwinick. See *U.S. v. Calabro*, 449 F. 2d 885 (2d Cir., 1971), cert. den. 404 U.S. 1047, cert. den. 405 U.S. 928, and other cases cited in our main brief (p. 13).

* This was stricken from the record (A161). Although appellee contends (brief, p. 50) that the reference was not stricken, the context of the trial Court's ruling (A161), "strike the reference to Botwinick and so forth", at least prevented the evidence from being considered against Botwinick. In any event, the reference was so vague as to constitute no evidence against Botwinick at all.

The evidence in this case is of no higher quality than that presented in *Michelman v. Clark-Schwebel Fiber Glass Corp.*, where this Court held that the evidence was insufficient to support the jury's verdict (75-7332, N.Y.L.J. 4/23/76).

The Court below has imposed personal liability for a judgment approaching one million dollars upon an individual who has not been shown to have participated in any alleged conspiracy, or to have had any knowledge of it. That judgment should not be allowed to stand.

CONCLUSION

The judgment of the District Court should be reversed and judgment should be granted in favor of the defendant Botwinick, or in the alternative, he should be granted a new trial.

Dated: New York, New York, May 20, 1976.

Respectfully submitted,

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Carley, Fone & Mittenlof

per B.P. Gansher

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ATTORNEYS FOR